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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

CHICAGO BRIDGE & IRON COMPANY,
Appellant,

v.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE,
Appellee.

ON APPEAL FROM THE
SUPREME COURT OF WASHINGTON

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS OR AFFIRM

F. A. LeSOURD
RODNEY J. WALDBAUM
Attorneys for Appellant

Office and Post Office Address:
LeSOURD & PATTEN
3900 Seattle-First National
Bank Building
Seattle, Washington 98154

TABLE OF CONTENTS

	Page
I. ABSENCE OF SELLING ACTIVITY IN STATE RENDERS GENERAL MOTORS AND STANDARD PRESSED STEEL INAPPLICABLE	1
II. WASHINGTON, AS THE STATE OF DELIVERY, IS DISCRIMINATING AGAINST INTERSTATE COMMERCE AND SUBJECTING CBI TO THE RISK OF MULTIPLE TAXATION . . .	6
III. A "VALUE-ADDED" CONCEPT IS CONSISTENT WITH APPORTIONED GROSS RECEIPTS TAXATION	16
IV. THE THREE KAMYR MANUFACTURING CONTRACTS HAVE BEEN DIS-ASSOCIATED FROM APPELLANT'S IN-STATE ACTIVITIES	18
CONCLUSION	20

TABLE OF AUTHORITIES

Cases

	Page
J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1937)	11
American Oil Company v. Neill, 380 U.S. 451 (1965)	19
Austin v. New Hampshire, 420 U.S. 656 (1975)	15

Page

Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977) 14

Complete Auto Transit v. Brady, 430 U.S. 274 (1977) 3, 6, 12, 17

Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981) 6

Evco v. Jones, 409 U.S. 91 (1972) . 11

Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980) 12, 13, 15

General Motors v. Washington, 377 U.S. 436 (1964) 1, 2, 3, 4

Maryland v. Louisiana, 451 U.S. 725 (1981) 8

Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980) 3, 6, 12, 13, 15

Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), reh'g denied, 439 U.S. 885 (1978) 14

Norton Co. v. Illinois Department of Revenue, 340 U.S. 534 (1951) . 19

Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951) 11, 12

Standard Pressed Steel Co. v. Washington Dept. of Revenue, 419 U.S. 560 (1975) 1, 2, 3, 4

Page

Wisconsin v. J. C. Penney,
311 U.S. 435 (1940) 6

Statutes

Washington (Revised Code of Washington)

RCW 82.04.040 5

RCW 82.04.050 5

RCW 82.04.060 5

RCW 82.04.440 8

RCW 82.04.460(1) 17

West Virginia

Ch. 11, Art. 13,
Code of West Virginia 10

Rules and Regulations

Wash. Admin. Code 458-20-137 10

W. Va. Reg. BOT § 1.2.A.1.b 10

Other Authority

Shores, "State Taxation of Interstate Commerce--Quiet Revolution or Much Ado About Nothing?" 38 Tax L. Rev. 127 (1982) 4

Washington Excise Tax Bulletin
No. 399.04.137 (7/3/70) 10

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I

ABSENCE OF SELLING ACTIVITY IN STATE RENDERS GENERAL MOTORS AND STANDARD PRESSED STEEL INAPPLICABLE

The State presents differing arguments as to why it believes this case is controlled by the holdings in General Motors v. Washington, 377 U.S. 436 (1964), and Standard Pressed Steel Co. v. Washington Dept. of Revenue, 419 U.S. 560 (1975).

At one point the State concedes that, here, there are not the type of in-state sales activities involved in those cases, and at another point it states that installation constitutes a selling activity.

The State argues that nexus may be the type of in-state activities involved in General Motors and in Standard Pressed Steel, but "in lieu of those activities, the nexus may be the actual in-state building, construction or manufacture of the property which is sold. And that is what is involved here". Motion to Dismiss or Affirm, p.6. The State then proceeds to argue that, so long as General Motors and Standard Pressed Steel do not require apportionment where there are in-state sales activities of the sort there involved, then there is no rationale for requiring apportionment where there are no such in-state sales activities.

no such in-state sales activities.

The State is correct that Appellant has chosen not to contest the State's imposition of its business and occupation tax (hereinafter "B&O tax") on the proceeds from those contracts in which its Washington sales office (located in Seattle) was involved in sales activities. To do so would have required a direct challenge to this Court's decisions in General Motors, supra, and Standard Pressed Steel, supra. While in light of Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980), and Complete Auto Transit v. Brady, 430 U.S. 274 (1977), Appellant believes that eventually this Court should re-examine those earlier decisions' acceptance of gross receipts taxation without apportionment where the contract proceeds resulted from in-state sales

activities,[1/] here Appellant chose to focus the Court's attention on the taxation of those 16 disassociated contracts in which the parties stipulated that there was no in-state sales procurement activity.

Despite its above-quoted concession that the nexus supplied by in-state installation activity is distinguishable from the selling activities which related to, preceded, and in practical effect resulted in the sales taxed in General Motors and Standard Pressed Steel, in

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1/ "If as Complete Auto suggests, the distinction between local and interstate activities no longer has a crucial role in commerce clause analysis, General Motors and Standard Pressed Steel have lost vitality. Taxes measured by gross receipts from interstate commerce should be recognized as taxes on or affecting interstate commerce and subject to the apportionment requirement as are other taxes affecting interstate commerce. There is no principled basis for treating them differently." Shores, "State Taxation of Interstate Commerce--Quiet Revolution or Much Ado About Nothing?" 38 Tax L.Rev. 127, 149-50 (1982). [Footnote Omitted.]

footnote 3 of its Motion to Dismiss or Affirm the State argues that installation of the structures in Washington constitutes "selling activity." In doing so, the State ignores the stipulated fact that Appellant's Seattle sales office "was not involved in any aspect of any of" the 16 contracts here involved (Stip. ¶ 18; emphasis supplied) and that the 16 contracts were in every case negotiated, procured and finalized between Chicago Bridge & Iron Company's (hereinafter "CBI") sales offices outside of the State of Washington and the customers' purchasing offices outside the State of Washington. Stip. ¶¶ 13, 14, 15, 17, 50; Stip. Attachments 1-16, item 7.

Although this installation activity has been defined by the Washington State Legislature as either a wholesale or retail sale (see RCW 82.04.040, RCW 82.04.050 and RCW 82.04.060), this formal

characterization does not transform installation activity into something other than what it is. See Wisconsin v. J. C. Penney, 311 U.S. 435, 443-44 (1940). The State's attempt to create constitutional significance by labeling the local taxable incident of installation as "making sales" is a mechanical approach involving definition and formalism, rather than substance, and has been rejected by this Court. See Complete Auto Transit, Inc. v. Brady, supra; Commonwealth Edison Co. v. Montana, 453 U.S. 609, 614-17 (1981); Mobil Oil Corp. v. Commissioner of Taxes, supra.

II

WASHINGTON, AS THE STATE OF DELIVERY, IS DISCRIMINATING AGAINST INTERSTATE COMMERCE AND SUBJECTING CBI TO THE RISK OF MULTIPLE TAXATION

Contrary to the State's claim, existing law does not support the State's assertion that as the state of delivery,

Washington is the only state which can impose a gross receipts tax based on the sales price of the products here involved.

This argument of the State, and the corresponding discussion in the opinion below, is based upon an attempt to bifurcate Washington's gross receipts tax into two separate taxes, that is, one on selling and one on manufacturing. There would be more substance to this argument if there were, in fact, two separate taxes so that a Washington manufacturer selling in Washington paid two taxes. In that case the Washington manufacturer would be on a par with its out-of-state competitor. But this is not the case.

The tax system of Washington itself negates this argument by integrating the gross receipts tax on both sales and manufacturing activities so that no tax is imposed on manufacturing in Washington if a tax is imposed on selling. What

renders the Washington tax discriminatory is that, in substance, one who is subject to the retail or wholesale B&O tax being imposed here is being given an exemption by RCW 82.04.440 from B&O manufacturing taxes otherwise due on the taxpayer's State of Washington manufacturing of the products sold, but is given no exemption from taxes which may be imposed under an identical law on this manufacturing if the taxpayer manufactures out-of-state and then ships the goods into Washington in interstate commerce. See, Maryland v. Louisiana, 451 U.S. 725 (1981).

The foregoing is true whether Appellant's in-state activities are referred to as "installation," as used in the Stipulation, or as "construction," as used in the State's motion here. What is involved is the putting together in Washington of subassemblies, sold and

manufactured outside Washington as a completed tank and shipped broken down. Apparently the State seeks to compare this situation with the building of a structure in Washington where some materials were purchased out of state. However, in that case, whether the materials came from within or without Washington, only Washington could tax the final sales price. If the materials came from out of state, then the state supplying the materials could tax only the value of the materials. Where, as here, the entire product is manufactured in one state, even though assembled or installed in another state, the state of manufacture can tax the entire final sales price under the tax system of Washington and other gross receipts states, with some states like Washington allowing deduction of the cost of installation and other states like West Virginia allowing deduction of

transportation costs.[2/] See Wash. Admin. Code 458-20-137; Wash. Excise Tax Bulletin No. 399.04.137, dated July 3, 1970; Ch. 11, Art. 13, Code of W.Va.; W.Va. Reg. BOT § 1.2.A.1.b.

The final sales price of a completed product, such as a tank, far exceeds the cost of the materials included therein since the final price must reimburse the

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[2/] West Virginia's statutes and regulations are similar to those of Washington. See Ch. 11, Art. 13, Code of W.Va.; W.Va. Reg. BOT § 1.2.A.1.b (which states that where the manufacturing occurs in West Virginia and the product is sold and shipped to another state, "the full amount received from such sale shall be reported under the manufacturing classification of the business and occupation tax return." If a constitutional distinction is to be made based on whether actual discriminatory gross receipts taxation has occurred, then Washington tax as here applied would be unconstitutional as to products manufactured in West Virginia and other gross receipts states and installed in Washington, but constitutional as to products manufactured in other states. This, we submit, would be an administrative nightmare when applied to the myriad of interstate transactions.

seller for all his sales, design, engineering, manufacturing, installation, and overhead costs. Thus, to have two states each tax a transaction based on the final sales price is to permit multiple taxation that differs from taxation by one state of the final sales price and by another of the price of some materials.

It is true that in Evco v. Jones, 409 U.S. 91 (1972), cited by the State, a gross receipts tax imposed by the state of origin with respect to interstate sales was struck down, citing with approval J. D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1937). At the time of those opinions this Court had held that a state tax would be unconstitutional if imposed directly on the "privilege" of engaging in interstate commerce, but could be valid if imposed on a "local incident" rather than directly on interstate commerce. See Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602

(1951). In 1977, this Court in Complete Auto Transit, supra, overruled the rule of Spector and cases incorporating such rule, and held that, in certain circumstances, a fairly apportioned state tax may be imposed directly on interstate commerce without regard to a formalistic label.

In both Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980), and Mobil Oil Corp. v. Commissioner of Taxes, supra, this Court rejected the attempt to establish an express constitutional preference for "taxation by allocation" (such as that imposed here by the State of Washington) over "taxation by apportionment" when interstate commerce is involved.[3/]

[3/] Similarly, by not enacting the legislation referred to on page 15 of the State's Motion to Dismiss or Affirm, Congress has rejected attempts to subject the unapportioned proceeds of a contract to gross receipts taxation by the destination state.

In both the Exxon and Mobil cases, the tax before this Court was already an apportioned tax. In each the taxpayer was arguing that the income in question should be allocated entirely to another state. If the law of the taxing state then before this Court were adopted by the state to which the taxpayer sought to have it allocated, there still would not have been even the risk of multiple taxation since the law of the state then before this Court would have required apportionment. See Mobil Oil Corp. v. Commissioner of Taxes, supra, 445 U.S. at 444. This is unlike the Washington B&O tax which allocates to itself 100% of CBI's gross receipts from these contracts, thereby subjecting CBI to the risk of discriminatory multiple taxation if the states of manufacture were to adopt the laws of the State of Washington.

The State's suggestion that, like the

pre-1968 New York transfer tax referred to in dicta in Boston Stock Exchange v. State Tax Commission, 429 U.S. 318 (1977), the Washington B&O tax is completely neutral as between interstate and intrastate commerce, ignores economic reality. Apparently the State's position is that its gross receipts tax is a single factor tax like a sales tax or like the tax involved in Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978), reh'g denied, 439 U.S. 885 (1978) and thus applies equally to in-state and out-of-state competitors. However, in Moorman, if the states of manufacturing and destination had had the same tax system as was there involved, there would have been only one tax on the interstate manufacturer/seller, just as there would have been on the in-state competitor.

Dismissal of this appeal would leave standing the opinion below holding that the risk of multiple taxation is not a

sufficient ground for declaring a tax unconstitutional, actual multiple taxation being required. This could result in the constitutionality varying according to the vagaries of the tax laws of each of the other states, a result contrary to the statements of this Court. Mobil Oil Corp. v. Commissioner of Taxes, supra, 445 U.S. at 444; Austin v. New Hampshire, 420 U.S. 656, 668 (1975). While this Court indicated that "these are the circumstances in which apportionment is ordinarily the accepted method" [Mobil, supra, 445 U.S. at 446, Exxon, supra, 447 U.S. at 229], here the State asserts that such apportionment has never been "required" by this Court. (Motion to Dismiss or Affirm, p.15 n.13.) The instant case affords this Court the opportunity to clearly establish a constitutional preference for "taxation by apportionment" since here, unlike the situation in Mobil and Exxon, the tax laws

before the Court fail to apportion.

If, as the State suggests, only the destination state may impose a gross receipts tax, then this Court should accept jurisdiction and so clarify the law. If, as Appellant suggests, there is no such preference for taxation by allocation then we request that the Court accept jurisdiction and rule for Appellant in this case.

III

A "VALUE-ADDED" CONCEPT IS CONSISTENT WITH APPORTIONED GROSS RECEIPTS TAXATION

The State argues that requiring reapportionment here would convert Washington gross receipts tax into a type of value-added tax. This argument incorrectly implies that the concepts are incompatible.

Just as taxpayers utilizing apportionment formulas in net income tax states apply the appropriate apportionment factor against an apportionable tax base, which includes income earned from

within and without the taxing state, so here CBI proposes that the ratio of in-state costs to total costs is an appropriate apportionment factor to apply against the undiminished apportionable tax base of receipts earned from activities within and without the State.

The State has never offered any rationale as to why this apportionment factor, which is required by RCW 82.04.460(1) for the gross receipts tax on services, should not be required for installation services in connection with sales procured and manufactured outside Washington State, other than to note the previously mentioned fact that Washington statutory law defines this installation service as a sale.

This Court has indicated that both "nexus" and "apportionment" are necessary for imposition of a state tax to be valid. Complete Auto Transit v. Brady, supra. An

apportionment that approaches a concept of taxing the relative "value added" to the product by the respective states involved is in accordance with this Court's preference for "apportionment," rather than "allocation," as discussed above.

IV

THE THREE KAMYR MANUFACTURING CONTRACTS HAVE BEEN DISASSOCIATED FROM APPELLANT'S IN-STATE ACTIVITIES

Appellant has shown that the three Kamyr manufacturing contracts are disassociated from Appellant's local business activities. Stip.¶ 17, 18, 50, 170, item 7 of Stip. Attachments 1, 2 and 3. Notwithstanding the fact that all activities under these contracts were stipulated to have taken place outside the State of Washington, other than delivery, the State argues that without the installation of the products by Appellant within the State of Washington, even though by separate contracts with a separate party,

the out-of-state sales of the components would never have taken place.[4/] There is no factual support for such allegation.

While as stated in paragraph 47 of the Stipulation, CBI did not "normally" contract for any single aspect (that is, design, engineering, procurement of materials, manufacturing, installation or delivery) without contracting for all aspects of a job, here CBI did enter into separate manufacturing contracts which did not provide for in-state installation. This does not mean that the purchaser would not have purchased the manufactured goods if its sister corporation had to

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[4/] The State makes a "but for" argument by which any state can impose an unapportioned gross receipts tax on any transaction in interstate commerce where some necessary post-sales event takes place in the state. This Court has previously rejected this type of argument where the event is post-sales. See Norton Co. v. Illinois Department of Revenue, 340 U.S. 534 (1951) (delivery); American Oil Company v. Neill, 380 U.S. 451, 457-459 (1965) (destination).

have a third party perform the installation activities. Appellant has paid and does not contest the B&O taxes with respect to the in-state installation contracts. It has, we submit, disassociated the separate manufacturing contracts, the entire performance of which occurred outside the State of Washington.

CONCLUSION

For all the reasons stated herein and in the Jurisdictional Statement, we respectfully submit the questions here presented are so substantial as to require plenary consideration, with briefs on the merit and oral argument, and request that the Court accept jurisdiction and ultimately rule for Appellant in this case.

DATED: August 30, 1983.

LeSOURD & PATTEN
Attorneys for Appellant

F. A. LeSourd

Rodney J. Waldbaum